Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC No. 96-59

In the Matter of	)	
	)	
Bell Operating Company	)	CC Docket No. 96-21
Provision of Out-of-Region	)	
Interstate, Interexchange Services	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: February 14, 1996 Released: February 14, 1996

Comment Date: 21 days after Federal Register publication
Reply Comment Date: 10 days after comment due date

By the Commission:

I. INTRODUCTION

1. The Telecommunications Act of 1996 ("1996 Act")[1] has just authorized the Bell Operating Companies (BOCs) to provide interLATA services originating outside their in-region states.[2] In this Notice of Proposed Rulemaking, we propose a regulatory regime to govern the BOCs' provision of all "out-of-region" interstate, interexchange services

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] For purposes of this proceeding, we define the terms "BOCs," "in-region state," "interLATA service," and "LATA" as those terms are defined in Sections 3(a)(35), 271(i)(1), 3(a)(42), and 3(a)(43), respectively, of the Communications Act of 1934, as amended, ("Communications Act"). The 1996 Act defines the term "LATA" (or local access and transport area) as a contiguous geographic area established by a BOC prior to enactment of the 1996 Act. See Pub. L. 104-104, § 3(a)(43), 110 Stat. 56, ___ (1996). We note that Section 271(j) of the Communications Act provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such service originates out-of-region. We further note that BOC provision to commercial mobile radio service customers, of interstate, interLATA services originating outside any of the BOC's in-region states, is included in the out-of-region services addressed in this proceeding.

(including interLATA and intraLATA services).[3] Specifically, we consider whether the BOCs should be regulated as dominant or non-dominant carriers with respect to the provision of such out-of-region services. We tentatively conclude that, if a BOC provides out-of-region interstate, interexchange services through an affiliate that satisfies the separation requirements established in the Competitive Carrier proceeding,[4] the BOC affiliate should be regulated as a non-dominant carrier. This Notice does not address BOC provision of in-region, interexchange services.

II. BACKGROUND

2. Between 1979 and 1985, the Commission conducted the Competitive Carrier proceeding, in which it examined how its regulations should be adapted to reflect and facilitate the increasing competition in telecommunications markets. In a series of orders,

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[3] Prior to enactment of the 1996 Act, the BOCs were prohibited from providing interLATA services by the terms of the Modification of Final Judgment ("MFJ"). The BOCs were not barred by the MFJ from providing interstate, interexchange services within a LATA boundary. See United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (approving MFJ); United States v. AT&T, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983). BOC provision of interstate, intraLATA services currently are subject to dominant carrier regulation. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fourth Report and Order, 95 FCC 2d 554, 557 n.6 (1983), vacated on other grounds, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993).

[4] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (First Report and Order); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Further NPRM); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report and Order), vacated AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order); Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

the Commission distinguished between carriers with market power (dominant carriers) and those without market power (non-dominant carriers). The Commission gradually relaxed its regulation of non-dominant carriers because it concluded that non-dominant carriers could not engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest.[5]

3. In its First Report and Order, the Commission classified local exchange carriers ("LECs") and AT&T as dominant carriers and concluded that these dominant carriers should be subject to the "full panoply" of then-existing Title II regulation.[6] Recently, in light of increasing competition in the interstate, domestic, interexchange telecommunications market, and evidence that AT&T no longer possesses the ability to control price unilaterally, the Commission reclassified AT&T as a non-dominant carrier in that market.[7]

4. In its Fourth Report and Order, the Commission considered how it should regulate the provision of interstate, interexchange services by independent LECs.[8] The

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[5] First Report and Order, 85 FCC 2d at 20-21. Non-dominant regulation entails freedom from price regulation (under either price caps or rate-of-return regulation), and allows a carrier to file tariffs on one day's notice, without cost support, with a presumption of lawfulness. Tariff Filing Requirements for Nondominant Carriers, CC Docket No. 93-36, Order on Remand, FCC 95-399 (rel. September 27, 1995). Additionally, several Section 214 requirements are streamlined for non-dominant carriers. For example, non-dominant carriers are automatically authorized to extend service to any domestic point and to construct, acquire, or operate any transmission lines, as long as they obtain Commission approval for the use of radio frequencies. In addition, requests by non-dominant carriers to discontinue or reduce service are deemed granted after 31 days unless the Commission objects. See 47 C.F.R. §§ 63.71, 63.07(a).

[6] First Report and Order, 85 FCC 2d at 22-24. Dominant carriers are subject to price cap regulation, and must file tariffs on 14, 45, or 120 days' notice. Dominant carriers are required to file cost support data for above-cap and out-of-band tariff filings, and additional information for new service offerings. See 47 C.F.R. §§ 61.41, 61.58(c). In addition, dominant carriers must obtain specific prior Commission approval to construct a new line, to extend a line, or to acquire, lease or operate any line, as well as to discontinue, reduce or impair service. 47 C.F.R. §§ 63.01 et seq.

[7] Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier, Order, FCC 95-427 (rel. October 23, 1995) ("AT&T Order"), petitions for reconsideration pending.

[8] By "independent LECs" we refer to exchange telephone companies other than the BOCs.

Commission determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant carriers.[9] In the Fifth Report and Order, the Commission clarified that an "affiliate" of an independent LEC for purposes of qualifying for regulation as a non-dominant carrier is "a carrier that is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with, an exchange telephone company."[10] The Commission went on to explain that in order to qualify for non-dominant status, the affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the exchange telephone company; and (3) obtain any exchange telephone company services at tariffed rates and conditions.[11] The Commission noted that these requirements would avoid imposing excessive burdens on independent LECs.[12] The Commission further concluded that, if an independent LEC provided interstate, interexchange services directly, rather than through an affiliate, those services would be subject to dominant carrier regulation.[13]

5. In the Fifth Report and Order, the Commission also addressed the possible entry of the BOCs into interstate, interexchange services in the future:

> The BOCs currently are barred by the [Modification of Final Judgment] from providing interLATA services. . . . If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.[14]

6. The 1996 Act authorizes the BOCs to provide out-of-region interstate and intrastate interLATA services upon enactment. More specifically, Section 271(b)(2) of the Communications Act provides that:

> A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside

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[9] Fourth Report and Order, 95 FCC 2d at 575-79.

[10] Fifth Report and Order, 98 FCC 2d at 1198.

[11] Id.

[12] Id.

[13] Id. at 1198-99.

[14] Id. at 1198-99 n.23 (citing United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982)).

its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).[15]

The 1996 Act does not require a BOC to obtain Commission authorization in order to begin offering out-of-region, interstate, interLATA services.

III. ANALYSIS

7. In order to permit efficient and rapid entry by the BOCs into out-of-region interstate, interexchange services, as contemplated by the 1996 Act, we seek in this proceeding to establish promptly the regulatory framework that will govern the BOCs' provision of such services. At the same time, we also seek to ensure that sufficient regulatory safeguards are in place to prevent a BOC from gaining any unfair competitive advantage, either through unreasonably discriminatory practices or cross-subsidization, that could arise because of its ownership and control of local exchange facilities.

8. Since divestiture, the MFJ has prohibited the BOCs from entering the domestic, interstate, interLATA market. Therefore, they will enter this market in out-of-region states with little or no market share. Additionally, we have found that significant segments of the domestic, interstate, interexchange market are characterized by substantial competition.[16] In our recent AT&T Order we found that there is significant excess capacity in this market and that there are a large number of long-distance carriers, including four nationwide, facilities-based competitors, AT&T, MCI, Sprint, and WorldCom; dozens of regional facilities-based carriers; and several hundred smaller resale carriers.[17] We further concluded that AT&T lacked individual market power in the overall interstate, domestic, interexchange market. These facts suggest that, upon entry into the provision of out-of-region interstate, interexchange services, BOC affiliates would not be likely to possess market power.

9. The BOCs, however, continue to control bottleneck local exchange facilities in their in-region states. The Commission has expressed concern about possible problems arising from an interexchange carrier's control over local exchange facilities. In its First Report and Order in the Competitive Carrier proceeding, the Commission stated that predivestiture AT&T's control of bottleneck facilities was "prima facie evidence of market

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[15] As noted, Section 271(j) provides that 800 service, private line service, or their equivalents that terminate in an in-region state and that allow the called party to determine the interLATA carrier shall be an in-region service.

[16] See, e.g., First Interexchange Competition Order, 6 FCC Rcd at 5887 (finding that the business services market is "substantially competitive").

[17] AT&T Order, at 38.

power requiring detailed regulatory scrutiny."[18] The Commission reiterated its concern over potential cost-shifting and anticompetitive conduct by exchange telephone companies in its Fifth Report and Order.[19] Because of such concerns, the Commission determined that interstate, interexchange services provided directly by independent LECs, rather than through an affiliate, should be regulated as dominant.[20]

10. The Commission further concluded, however, that an affiliate of an independent LEC providing interstate, interexchange services would qualify as a non-dominant carrier if the affiliate were sufficiently separated from the local exchange company. The Commission specified the separation requirements that would provide some "protection against cost-shifting and anticompetitive conduct" by an independent LEC that could result from using its control of bottleneck facilities.[21] The Commission concluded that the specific separation requirements would not impose excessive burdens on independent LECs and noted that those requirements were less stringent than those established in the Second Computer Inquiry.[22]

11. In seeking to facilitate timely entry by the BOCs into the provision of out-of-region interstate, interexchange services, consistent with the 1996 Act, we tentatively conclude that the separation requirements applied to independent LECs provide a useful model upon which to base, on an interim basis, oversight of BOC provision of out-of-region interstate, interexchange services. We intend to consider in our upcoming interexchange proceeding, however, whether it may be appropriate to modify or eliminate the separation

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[18] First Report and Order, 85 FCC 2d at 21. At the time of that order, AT&T controlled both the long distance network and the local bottleneck facilities, and competition in the long distance market was still in its infancy.

[19] Fifth Report and Order, 98 FCC 2d at 1195.

[20] Id. at 1198-99.

[21] Id. The Commission also noted that it had additional regulatory tools to inhibit such practices. For example, the Commission noted that exchange telephone companies are required to interconnect with all interexchange carriers on just, reasonable, and nondiscriminatory terms, that interstate exchange access services are regulated as dominant and subject to full tariff review, and that the complaint process is available to address any allegations of discrimination. Id. at 1195-96.

[22] Id. at 1198. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980).

requirements[23] in order for some or all LECs to qualify for non-dominant treatment in the provision of out-of-region interstate, interexchange services.

12. While we address here the BOCs' provision of interexchange services originating outside the regions where the BOCs control local bottleneck facilities, some of this traffic will terminate in the regions where the BOCs retain control of local bottleneck facilities. We tentatively conclude that the separation requirements found adequate to permit non-dominant regulation of independent LEC provision of interstate, interexchange services originating and often terminating in their regions should be sufficient to allow similar treatment of BOC provision of interexchange services that originate out of their in-region states.

13. Thus, we tentatively conclude that, for now, if a BOC creates a separate affiliate to provide out-of-region interstate, interexchange services (including interLATA and intraLATA services), and if the affiliate satisfies the conditions set forth in the Fifth Report and Order,[24] then the affiliate will be classified as a non-dominant carrier. As previously noted, these conditions are that the affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the BOC local exchange company; and (3) obtain any BOC exchange telephone company services at tariffed rates and conditions. We note that independent local exchange carriers providing interexchange services through affiliates pursuant to the Fifth Report and Order treat those affiliates as nonregulated affiliates under the Commission's joint cost rules[25] and affiliate transaction rules[26] for exchange carrier accounting purposes. We seek comment on whether a BOC affiliate providing out-of-region, interstate, interexchange services should be treated as a nonregulated affiliate for BOC accounting purposes. Finally, we tentatively conclude, at least for the present time, that if a BOC directly, or through an affiliate that fails to comply

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[23] We note that some BOCs may choose to provide out-of-region interstate, interexchange services through the same separate affiliate that the 1996 Act requires BOCs to establish in order to provide in-region interexchange services. See Pub. L. 104-104, § 151 (adding Section 272 to Title II of the 1934 Act and requiring that BOC provision of in-region, interLATA services be made through a structurally separate affiliate).

[24] See Fifth Report and Order, 98 FCC 2d at 1198.

[25] See 47 C.F.R. §§ 64.901-904; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987).

[26] See 47 C.F.R. § 32.27.

with these separation requirements, provides out-of-region interstate, interexchange services, those services will be regulated as dominant carrier offerings.[27]

14. We invite comment on our tentative conclusions regarding BOC provision of out-of-region interLATA and intraLATA services. Any party disagreeing with these tentative conclusions should explain with specificity its position and suggestions for alternative regulatory policies. As noted, we believe that applying the well-established Fifth Report and Order requirements will facilitate rapid entry by the BOCs into the provision of out-of-region services, consistent with the intent of the 1996 Act, without imposing onerous burdens on them.

IV. PROCEDURAL ISSUES

A. Ex Parte Presentations

15. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Regulatory Flexibility Analysis

16. We certify that the Regulatory Flexibility Act is not applicable to the rule changes we are proposing in this proceeding. If the proposed rule changes are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Entities directly subject to the rule changes, and proposed rule changes, are large corporations engaged in the provision of local exchange and exchange access telecommunications services. We are nevertheless committed to reducing the regulatory burdens on small communications services companies whenever possible, consistent with our other public interest responsibilities. The Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq. (1981).

C. Comment Filing Procedures

17. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 21 days after publication in the Federal Register, and reply comments on or before 10 days after the comment due date. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you

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[27] See, e.g., 47 C.F.R. §§ 61.38, 61.41-61.47, 61.49.

want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

18. In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than twenty-five (25) pages and reply comments be no longer than fifteen (15) pages. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading.[28]

19. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

D. Ordering Clauses

20. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4, 201-205, 215, 218, 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218 and 220, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

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[28] Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commissions Rules. See 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. The summary may be paginated separately from the rest of the pleading (e.g., as "i, ii"). See 47 C.F.R. § 1.49.

21. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary